Supreme Court of the United States.

No. 290.

MARIA F. THOMAS AND GEORGE FOLSOM,

vs.

THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY.

Argument for George Folsom

On Certificate from United States Circuit Court on Appeals, Sixth Circuit.

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for George Folsom.

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STATEMENT.

Maria F. Thomas, a citizen of the State of Michigan, filed a bill of complaint in the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, against George Folsom, a citizen of California, and the Board of Trustees of the Ohio State University, for a partition of cer-

tain lands claimed to be held in common by her and the said George Folsom. The Board of Trustees claimed title to the lands adversely to the said Maria F. Thomas and George Folsom, and the bill therefore sought to have the title determined as preliminary to the partition.

In an amendment to the bill are found the following averments in respect to the capacity of the said Board of Trustees to be sued in that name, and as if it were a corporation of Ohio, within the jurisdictional rule imputing for purposes of federal jurisdiction the citizenship of corporators to the state under whose laws the corporation was organized, which averments are in the following language, to-wit:

> "She avers that the said The Board of Trustees of the Ohio State University is a citizen of and domiciled in the State of Ohio.
>
> And your complainant further avers that the said respondent, The Board of Trustees of the Ohio State University, was created by and exists under and by virtue of a law duly passed and enacted by the legislature of said State of Ohio, on March 22, 1870, and now known and designated as sections 4105-9 and following of the Revised Statutes of said State of Ohio, and the subsequent acts amendatory of and supplementary thereto.
>
> And your complainant further avers that said respondent, said The Board of Trustees of the Ohio State University, under and by virtue of the aforesaid laws and enactments, and at all times since its creation and establishment, is fully authorized and empowered to sue and be sued; to contract and be contracted with; to make and use a common seal, and to alter the same at its pleasure; and to adopt by-laws, rules and regulations for the government of said college, and to have the general supervision of all lands, buildings and other property belonging to said col-

lege; and of receiving by gift, devise or bequest, moneys, lands and other properties for its benefit and for the benefit of those under its charge, subject, however, to the provisions, exceptions and restrictions contained in section twenty (20) and five thousand nine hundred and fifteen (5915) of the Revised Statutes of the State of Ohio."

The Board of Trustees thereupon appeared and filed a demurrer, which is in the following words:

"The Demurrer of the Defendant, The Board of Trustees of the Ohio State University, to the Bill of Complaint of the Plaintiff.

This defendant, not confessing all or any of the matters in the bill of complaint contained to be true as therein set forth, doth demur to said bill. And for cause of demurrer showeth:

That the complainant hath not in her said bill made or stated such a case as entitled her in a court of equity, to any relief, against this defendant, as to the matters contained in the said bill, or any of said matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto. And it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill; and this defendant humbly prays to be hence dismissed with its reasonable costs in this behalf sustained."

This demurrer was sustained and a decree entered reciting that "on consideration whereof the court finds and holds that neither the plaintiff, Maria F. Thomas, nor the defendant, George Folsom, has any right, title, interest or estate in the lands described in the bill or in the rents or profits thereof, but that the same since the death of Charlotte G. Page, have been

and are the property in fee simple of the Board of Trustees of the Ohio State University. Said demurrer is, therefore, sustained and the bill is dismissed at the costs of the plaintiff, to which she excepts and prays an appeal, which is allowed and the appeal bond is fixed at $500.00"

From this decree both Maria F. Thomas and George Folsom prayed and perfected an appeal.

Folsom entered his appearance in the Circuit Court, but filed no defense and no decree by default was taken against him.

The jurisdiction of the Circuit Court was wholly dependent upon diversity of citizenship. Neither defendant made any objection in the Circuit Court to its jurisdiction, neither claiming that the case stated was not one of equitable cognizance nor within the jurisdiction of a Federal Court.

In the Circuit Court of Appeals George Folsom as appellant insisted that the action made by the pleadings was one at law and not in equity, that before partition could be made the question of title would have to be decided in an action at law, and that the Circuit Court had no cognizance of the cause because the requisite diversity of citizenship does not exist.

He contended that the Board of Trustees of such University is not a corporation at all and has by the Supreme Court of Ohio been so held, and that it could not therefore fall within the jurisdictional rule imputing to its members citizenship of that state under whose law it is organized.

The Circuit Court of Appeals, having grave doubts touching the jurisdiction of the Circuit Court, ordered that a statement be certified to the Supreme Court of the United States,

and that the instruction of such Court be requested in the proper decision of the following questions which arose upon the record:

> "Does the bill sufficiently aver that the Board of Trustees of the Ohio State University is a corporation of the State of Ohio, or does it aver facts which in legal intendment constitute said body a corporation of the State of Ohio, within the rule that a suit by or against a corporation in a court of the United States is conclusively presumed, for the purposes of the litigation, to be one by or against citizens of the State creating the corporation?
>
> If the said Board of Trustees be not such a corporation as is required by the jurisdictional rule referred to, may this suit be maintained against it as "The Board of Trustees of the Ohio State University" without bringing the persons constituting the board before the court as defendants?
>
> If the said board may sue or be sued in a Federal court by the name of "The Board of Trustees of the Ohio State University," although not constituting a corporation of the State of Ohio, within the jurisdictional rule referred to in the first question, do the facts stated on the face of the bill sufficiently show that the persons composing said Board of Trustees are citizens of Ohio, or should the court take notice of the law creating said Board of Trustees, and of other laws of Ohio defining the qualification of such trustees, and by legal intendments find that the persons constituting said board when this bill was filed were in fact citizens of Ohio and that the requisite diversity of citizenship existed to give jurisdiction to the circuit court?"

That the Court may the better understand the case, it will be necessary to know the State of Ohio legislation and decisions.

THE STATUS OF OHIO LEGISLATION AND DECISIONS.

On the 22nd day of March, 1870, (67 O. L. 20) the General Assembly of Ohio enacted a law establishing a college to be styled "The Ohio Agricultural and Mechanical College," whose leading object should be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and mechanic arts. The college was established in accordance with the provisions of an act of Congress of the United States, passed July 26, 1862, entitled: "An Act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and mechanic arts." The government of the college was vested in a Board of Trustees, consisting of one from each Congressional District of the State, to be appointed by the Governor, by and with the advice and consent of the Ohio State Senate. The President of the State Board of Agriculture was made ex-officio member of the board. The terms of the members of the Board were fixed and the trustees and their successors in office were styled, "Board of Trustees of the Ohio Agricultural and Mechanical College." They were given the right as such Board of Trustees of suing and being sued, of contracting and being contracted with, of making and using a common seal and altering the same; they were given power to adopt by-laws, rules and regulations for the government of the college; to elect a president; to determine the number of professors and tutors, elect the same and fix

their salaries. They were also empowered to remove the President or any professor or tutor whenever the interest of the college in their judgment should require it, and to fix and regulate the course of instruction and prescribe the extent and character of experiments to be made. In the interim between the sessions of the Board, an executive committee was given the management and control of the affairs of the college, under the direction of the Board, and was required to report its doings to the Board at every regular meeting and at such other times as the Board might direct. The Board of Trustees were given the power to regulate the admission of pupils to the college, and the general supervision of all land, buildings and other property belonging to the college, and the control of all expenses therefor, but was prohibited from contracting any debt not previously authorized by the General Assembly of the State.

The Board was empowered to select its own chairman, appoint a secretary, treasurer, librarian, and such other officers as might be required, and to fix the terms and salaries of such officers, reserving, however, the right of removal.

Other provisions of the Act authorized the Board of Trustees to collect specimens in mineralogy, geology, etc., and specimens pertaining to natural history and the sciences; to receive and hold in trust for the use and benefit of the college any grant or devise of land and any donation or bequest of money or other personal property, to be applied to the general or special use of the college; but the title to all lands for the use of the college was required to be made in fee simple to the State of Ohio, with covenants of seizin and warranty.

The Governor was authorized to call the first meeting of the members of the Board as soon after the appointment as he deemed it advisable, after which the Board determined the date of its meetings. It was required to submit an annual report to the Governor of the condition of the college and of its receipts and disbursements, of the number of professors, teachers, officers and students, and showing an estimate of the expenses of the ensuing year, etc.

Reference to other provisions relating to the Board of Trustees and the University will be made in the course of this argument.

From time to time the original Act was amended, and the provisions relating to the Board of Trustees and the Ohio State University at the time of the commencement of the action in the Circuit Court will be found in Bates' Annotated Ohio Statutes, 4th. Ed., Secs. 4105-9 to 4105-53, both inclusive.

The name of the institution was changed (75 O. L. 126; Secs. 4105-36 to 4105-45, both inclusive, R. S.) to the Ohio State University, and the Board of Trustees was reduced in number to seven.

The powers vested in the Board of Trustees as to instituting and defending suits and as to contracting and being contracted with have remained the same since the founding of the institution; but other powers were somewhat modified, as hereafter noted.

The validity of the Act creating the Ohio Agricultural and Mechanical College (now the Ohio State University) was soon called in question, by virtue of transactions originating in 1871, within less than a year after the passage of the origin-

al act, and in 1876 in Neil v. Board of Trustees of the Ohio Agricultural and Mechanical College, 31 O. S. 15, the Supreme Court of Ohio decided that *"the act to establish and maintain an agricultural and mechanical college in Ohio (67 Ohio L. 20) does not constitute the board of trustees therein provided for, a corporation."*

Judge Boynton, in his opinion (pp. 20-21) said:

"It is claimed by the plaintiff that the board of trustees of the college has not legal capacity to sue, and, therefore, that the judgment was improperly rendered in its favor. It is not, however, denied that the fourth section of the act establishing the college (67 Ohio L. 20) expressly confers upon the board the "right of suing and being sued, of contracting and being contracted with;" but it is contended that such act, "insofar as it attempts to constitute the defendant in error the board of trustees of said college, and to clothe it with the power therein mentioned," is in conflict with the first section of the thirteenth article of the constitution, which declares that the "General Assembly shall pass no special act conferring corporate powers;" the claim being that the board is, to all intents and purposes, created a corporation and clothed with corporate functions and privileges. We are not able to yield our assent to this construction of the statute. The act is entitled: "An Act to establish and maintain an agricultural and mechanical college in Ohio." It creates a board of trustees to be appointed by the Governor by and with the advice and consent of the Senate; and commits to such board the government, control and general management of the affairs of the institution; and while the statute authorizes the board to make contracts for the benefit of the college, and to maintain actions, if necessary, to enforce them, and to exercise other powers similar to those conferred on bodies corporate, it does not assume to, nor does it in fact, create or constitute such board of

trustees a corporation; and hence does not clothe it with corporate functions or powers. The college is a state institution, designed and well calculated to promote public educational interests established for the people of the whole state, to be managed and controlled by such agencies as the legislature in its wisdom may provide. Similar powers, but perhaps less extensive, because less required, are conferred on the trustees of the various hospitals for the insane (73 O. L. 80), and on the board of managers of the Ohio Soldiers' and Sailors' Orphans' Home (67 O. L. 53) and other institutions of the state. The powers thus conferred are essentially necessary to accomplish the objects for which these institutions were established. The power to establish them is found clearly granted in the seventh article of the constitution."

The above decision remains unreversed and unmodified.

Suits have been maintained by the Board of Trustees in the Ohio Courts on various occasions, as in Board of Trustees of the Ohio State University v. Folsom, 56 O. S. 701, so that the board has continued to be recognized as a constitutional body.

Had the Ohio court found that the Board of Trustees was a corporation, it would necessarily have found that the act creating it was unconstitutional and within the inhibition of Section 1, Article 13, of the Constitution, which prohibits special acts conferring corporate powers.

No corporation, private or public, can be constitutionally created in Ohio by a special act conferring corporate powers. They must rest for their validity upon general laws, and "all laws of a general nature shall have a uniform operation throughout the state." Sec. 26, Art. 2, Constitution of 1851.

The Ohio court found authority for the establishment of the college in Article 7, of the Ohio Constitution of 1851, which provides, among other things, as follows:

> "Sec. 1. Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state, and be subject to such regulations as may be prescribed by the general assembly.
>
> Sec. 2. The directors of the penitentiary shall be appointed or elected in such manner as the general assembly may direct; and the trustees of the benevolent and other state institutions, not elected by the general assembly, *and of such other state institutions as may be hereafter created,* shall be appointed by the Governor, by and with the advice and consent of the senate," etc.

The statutory provisions relating to the institutions mentioned in Article 7 of the Constitution are found in Bates' Annotated Ohio Statutes, Fourth Ed., part first, title 5, Secs. 623 to 781-30, both inclusive, and relate to such institutions as those for the deaf and dumb, the blind, feeble minded youth, soldiers' and sailors' home, the Ohio soldiers' and sailors' orphans' home, asylums for the insane, Longview asylum, hospital for epileptics, boys' industrial school, etc. The above constitutional provision recognizes state institutions as existing in 1851, and authorizes the creation of others.

From time to time the Boards of Trustees created by the Ohio statutes have sued or been sued as boards (Beaver & Butt v. The Board of Trustees of the Institution for the Blind, 19 O. S., 97; The State ex rel. v. The Trustees of the Ohio Soldiers' and Sailors' Orphans' Home, 37 O. S., 275), without any question ever being made as to their legality.

The principle of the foregoing cases was involved in State v. Davis, 23 O. S., 434, decided in 1872, in which the constitutionality of "An act regulating the Commercial Hospital of Cincinnati" was under consideration, and was held valid and not to be a special act conferring corporate powers, and consequently not in violation of Section 1, Article 13, of the Constitution.

That case and the doctrine therein announced was cited and followed in State v Hoffman, 35 O. S., 435, and State v. Cappeller, 39 O. S., 207.

Longview Asylum, one of the above mentioned benevolent institutions, is defined in State ex rel. v. Ogelvee, 36 O. S., 211, to be a "public institution," though not a state institution. Under the doctrine of that case, a public institution is also a state institution if all of its trustees are appointed by the Governor.

The uniform policy of the state, as evidenced by legislative enactments and by an unbroken line of judicial determinations, antecedent as well as subsequent to the decision in the Neil case, *supra*, has been to treat all such benevolent institutions, including the Board of Trustees of the Ohio State University, as merely state, or both state and public institutions, established for the benefit of the people of the whole state, and controlled and managed, under the direction of the legislature, by such agencies as the legislature in its wisdom may provide.

The corporate existence of the Board of Trustees of the Ohio State University was not averred in Maria F. Thomas' bill of complaint or the amendment thereto, because such existence was not a fact, and could not be truthfully averred.

"DOES THE BILL SUFFICIENTLY AVER THAT THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY IS A CORPORATION OF THE STATE OF OHIO, OR DOES IT AVER FACTS WHICH IN LEGAL INTENDMENT CONSTITUTE SAID BODY A CORPORATION OF THE STATE OF OHIO, WITHIN THE RULE THAT A SUIT BY OR AGAINST A CORPORATION IN A COURT OF THE UNITED STATES IS CONCLUSIVELY PRESUMED, FOR THE PURPOSE OF THE LITIGATION, TO BE ONE BY OR AGAINST CITIZENS OF THE STATE CREATING THE CORPORATION?"

The allegation in the amendment to the bill of complaint is that "the said Board of Trustees of the Ohio State University is a citizen of and domiciled in the State of Ohio." This averment is not sufficient to confer jurisdiction.

Corporate existence, to confer jurisdiction on the Federal Courts, must either be distinctly averred in the pleadings or must clearly appear in the record. The pleadings must aver that the corporate body is a corporation so created by law.

Desty's Fed. Proc., 9th Ed., p. 378.

Shiras, in his work on Equity Practice, 2d Ed., p. 32, states that when a corporation is a party, "it is not sufficient to simply aver that the corporation is a citizen of a named state, but the corporate name should be set forth, followed by the averment that the same 'is a corporation created under the laws of the State of ——,' and having its principal place of business at ——."

Garland & Ralston, in Vol. 2 of their work on Federal Practice, p. 929, give forms for alleging corporate existence after the manner designated by Shiras.

See also Loveland's Forms on Federal Proc., Vol. 1, p. 230.

In Bates' Fed. Eq. Proc., p. 146, it is said that "In suits by or against a corporation, where the jurisdiction is based upon the citizenship of the parties, it is not sufficient to aver simply that the corporation is a citizen of a particular state, but it should be averred that the corporation was created by the laws of the state, of its incorporation, and that it is a citizen of that state, having its principal place of business therein." But in the case at bar, there is not the slightest intimation of corporate existence. Citizenship and domicile are averred, but the character of the thing sued is not stated. The name would indicate that it is not an individual, but the pleadings do not say what it is.

Corporate existence is a jurisdictional fact to be positively averred. The author last named, in discussing the method of pleading such fact, says (Sec. 125):

> "Every original bill filed in a Circuit Court of the United States should contain in the stating part a certain, distinct, direct and positive averment of all the facts upon which the jurisdiction of the court rests; and if it does not contain such averment it will be fatally defective, and the court, upon demurrer or motion, or upon its own inspection of the bill, must dismiss the suit. The rule is inflexible and without exception that the facts upon which the jurisdiction of the courts of the United States rests must affirmatively appear in the record of all suits prosecuted before them; and the jurisdictional facts must affirmatively appear at the commencement of the suit by a statement of them in the declaration or bill of the party suing. The reason of this rule of pleading is that the jurisdiction of the courts of the United States depends alone

upon the federal constitution and the acts of congress, and it is a limited jurisdiction; and there are no presumptions in favor of that jurisdiction, but every case is presumed to be without the jurisdiction of such courts, unless the contrary affirmatively appears from the record, and this presumption obtains in every stage of the cause from its inception to its conclusion; and it is the duty of all the courts of the United States, upon their own motion, to deny their own jurisdiction when it does not affirmatively appear in the record, whether a defect of jurisdiction is or is not suggested by the parties."

The utterances of this court sustain our contention.

In LaFayette Insurance Co. v. French, 18 How., 404, the plaintiffs in their declaration complained of "The LaFayette Insurance Company, a citizen of the State of Indiana." Mr. Justice Curtis said: "This averment is not sufficient to show jurisdiction. It does not appear from it that the LaFayette Insurance Company is a corporation; or, if it be such, by the law of what state it is created. The averment that the company is a citizen of the State of Indiana, can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons or an association into a body politic, created by law, is a citizen of a state within the meaning of the constitution." The averment of corporate existence in the replication filed in that case alone saved it from dismissal.

In Piquignot v. Pennsylvania Railroad Company, 16 How., 104, "the declaration stated the plaintiff to be a citizen of France, but gives no character as to the citizenship of the defendant. The name is most probably not intended to designate an individual; if not, the record does not state that it is a

corporation incorporated by the laws of Pennsylvania, or having its principal place of business there, or that its incorporators, managers or directors are citizens of Pennsylvania, nor can want of such averment be supplied by inference from the name."

In a note to the last preceding case it appears that:

"It is not enough to say that the corporation is a citizen of the state where suit is brought; but an averment that the corporation was created by the laws of the state and had its principal place of business there is sufficient on demurrer. LaFayette Ins. Co. v. French, 18 How., 404. See also Express Co. v. Kountze, 8 Wall., 342. An averment that the defendant 'is a body politic *in the law of and doing business in*' a given state is insufficient to show defendant's citizenship in the state named. Pennsylvania v. Quicksilver Co., 10 Wall., 553, and see Ins. Co. v. Francis, 11 Wall., 210."

In Pennsylvania v. Quicksilver Co., 10 Wall., 553, *supra*, the court was of the opinion that the averment, to-wit, "a body politic in the law of and doing business in" a given state, is insufficient to establish that the defendant was a California corporation. It was said that the defendant is a corporation doing business in that state by an agent, but not that it had been incorporated by the laws of that state, and adds: "It would have been very easy to have made the fact clear by averment, and, being a jurisdictional fact, it should not have been left in doubt."

"In courts of law, an act of incorporation and a corporate name are necessary to enable the representatives of numerous associations to sue and be sued."

Marshall v. *B. & O. R. R. Co.*, 16 How., 328.

"It should appear by the declaration or bill of com-

plaint, that the *corporation* was created by the state whereof the adverse party is not a citizen, but a defective averment of that fact may be cured by the subsequent pleadings."

Muller v. *Dows*, 94 U. S. 444.

Express Co. v. Kountze Bros., 8 Wall., 342, furnishes an example of a sufficient allegation of corporation existence, the averment being "that the defendant is a foreign corporation, formed under and created by the laws of the state of New York."

> "The averment in the bill that the plaintiff corporation is a citizen of the state of Illinois is in itself not sufficient to show jurisdiction, as a corporation cannot be a citizen of a state, in the sense in which that rule is used in the constitution."
>
> *Manufacturers' Nat'l Bank* v. *Baack*, 16 F. C. No. 9052, p. 672.

If the allegation that a party is a corporation and is a citizen is not sufficient, then much more insufficient must be the averment that a defendant is an artificial entity, not designating it as a corporation at all, but simply as a citizen of some given state.

The doctrine of the foregoing cases is that corporate existence must be positively averred, or must be, as a fact, brought affirmatively into the record.

In the case of the Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S., 449, there was involved the question of whether a limited partnership formed under the laws of the State of Pennsylvania (Pa. Laws, 1874, p. 271), could maintain a suit in its own name in the United States courts. A limited partnership of the kind under consideration in that

case exercised even greater corporate powers than have been conferred on or exercisd by the Board of Trustees of the Ohio State University. The Constitution of Pennsylvania provides that the term "corporations," as used in Art. 16, "shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships." The limited partnership was not alleged to be, nor could it have been alleged to be, a corporation by virtue of the Pennsylvania statute under which it was organized, and the same is true of the Board of Trustees in the case at bar.

The partnership, like the Board of Trustees in this case, and the United States Express Co., in Chapman v. Barney, 129 U. S., 677, was authorized by the law of the state of its creation to sue and be sued in such state in the name assumed by or conferred upon it. But Mr. Justice Harlan said that "the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the state creating the corporation." The Pennsylvania courts had held that such a partnership was not a corporation, although it was a new artificial being, having some of the characteristics of a partnership and some of a corporation. The fact that it was defined by the Pennsylvania courts as a "*quasi* corporation" or "a new artificial person," did not induce this court to accord to such partnership the right to maintain suits in the United States courts, and it was held

necessary that the citizenship of the individual members of the partnership or association should be set out in the pleadings.

The import of the foregoing cases is that the only persons that can maintain a suit in the federal courts are natural persons or the artificial entities or persons known as corporations.

Should this court hold that the Board of Trustees of the Ohio State University is a corporation of the State of Ohio, it must refuse to follow the decision of the Supreme Court of that state,—must, in fact, nothwithstanding the established policy of the state, long acquiesced in, declare the law creating the defendant Board of Trustees unconstitutional.

The establishment of a State University for the encouragement of higher and technical education is a matter of purely local nature, in which the nation as a whole is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling. The matter is peculiarly within the domain of the state.

In the construction of the statutes and laws of the state the general principle is that the judicial department of the state is the appropriate organ for this purpose, and that the decisions of the highest courts of the state construing its statutes are binding on the federal courts, although they would put a different construction on them were they first called upon to construe them. "This rule, that the federal court follows state decisions as to state laws and rights under them, is almost invariable." Brannon, on the Fourteenth Amendment,

397. "For the sake of harmony and to avoid confusion, the courts of the United States will lean toward an agreement of views with the state courts if the question seems to be balanced in doubt." Burgess v. Seligman, 107 U. S., 20. And if the federal court be bound by the interpretation of the Ohio statute by the state court, it need not review the reasoning by which that interpretation was reached. New York Life Ins. Co. v. Cravens, 178 U. S., 389-395.

Chief Justice Harlan, sitting in the Seventh Circuit Court of Appeals, in O'Brien v. Wheelock, 95 Fed. Rep., 883, defined the attitude of the federal courts on pp. 904 and 905, as follows:

> "In other words, as the act of 1871 had not been construed by the Supreme Court of Illinois when the bonds held by the plaintiff were issued, it is the province and duty of this court to exercise an independent judgment as to its validity under the Constitution of Illinois; but in doing this there are two principles that should not be overlooked: (1) That, although the act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiff were proved, this court should give effect to any ruling or construction that may have been previously established by the highest court of the state in interpreting similar provisions in the Constitution of 1848; (2) that the federal courts, for the sake of harmony and to avoid confusion, should 'lean toward an agreement of views with the state courts, if the question seems to them balanced with doubt,' and endeavor to 'avoid any unseemly conflict with well considered decisions of the state courts' upon questions of local law."

The complainant below might have brought her suit in the state court had she chosen that forum, and in the state court

she could have presented and had determined every question here involved.

Federal jurisdiction in this case depends solely on diversity of citizenship. The law creating the defendant Board of Trustees, the whole matter in controversy, is local and non-federal. Many states have provided for great universities. There is more or less diversity in the provisions of their respective laws. None of these laws are extraterritorial in their operation. The Ohio law is as peculiarly local as is its statute of limitations, or its law governing voluntary assignments for the benefit of creditors, or its law in relation to fraudulent conveyances, usury, marriage contracts and recording acts. Laws have been enacted on all of these subjects by the several states, and the decisions of the state courts on such subjcts are recognized as binding on the federal courts and are followed by them.

Mr. Justice Miller, in Bucher v. Cheshire, 125 U. S., 555, said: "It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or have always been a part of the law of the state, that the decisions upon the subject are usually conclusive and always entitled to the highest respect of the federal courts. * * * * * * Where such local law or custom has been established by repeated decisions of the highest courts of the state, it becomes the law governing the courts of the United States sitting in that state."

The laws of the several states include state constitutions, statutes, common laws, and decisions expounding them.

Brannon on the Fourteenth Amendment, 393.
Bucher v. *Cheshire*, 125 U. S., 582.

"The public policy of a state may be deemed to be authoritatively declared by its courts. Their evidence we cannot oppose by speculations or views of our own, nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred or permitted to be enforced."

New York Life Ins. Co. v. *Cravens*, 178, U. S. 398.

Should the court not follow the wake of the Ohio decisions and legislative enactments, then there will be one rule for citizens of Ohio and another for residents of other states, and this, it was said in Jencks v. Quidwick Co., 135 U. S., 457, "would be unfortunate, to say the least."

A resident of Ohio, for instance, would be compelled to submit to taxation for the support of the university, while the property of a non-resident, should he contest the levy in the federal courts, would be exempt; for, if this court should refuse to follow the Ohio court, it must find that corporate powers were conferred by a special act of the Ohio legislature —that a corporation known as the Board of Trustees of the Ohio State University, was called into existence by a law which did not have a uniform operation throughout the state, and consequently that the law creating the defendant Board of Trustees is an unconstitutional law. The decision of the Ohio court construing the act in question and the Constitution of its own state is conclusive on the federal courts.

"The decision of the highest court of the state, that a statute is not in conflict with the constitution of the state, is conclusive on the federal courts."

Brown v. *New Jersey*, 175 U. S., 172.

There is no Ohio decision, earlier or later, in conflict with that announced in the Neil case, *supra*.

Nor has the Board of Trustees acquired any right upon the faith that the act, 67 O. L., 20, created a corporation.

Hence, as held by the Sixth Circuit Court of Appeals, in 86 Fed. Rep., 597, the decision of the Ohio court is controlling.

> "The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the Supreme Court of a state has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions. In Claiborne County v. Brooks, 111 U. S., 400, it was said: 'It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state'."
>
> *Forsyth* v. *Hammond*, 166 U. S., 518, 519.
>
> "The *first* ruling of the Supreme Court of the state upon a particular question involving the construction of a state statute will be followed by the federal court."
>
> *Andrews* v. *Nat. Foundry and Pipe Works*, 76 Fed. Rep. 166, decided by the 7th C. C. A.
>
> "It is an elementary principle that this court in interpreting a state statute, will construe and apply it as settled by the court of last resort of the state, and will, hence, only form an independent judgment as to the meaning of the state law when there was no binding construction of such state statute by the court of last resort of the state."
>
> *Sioux City T. R. & W. Co.* v. *Trust Company of N. A.*, 173, U. S., 99, 107.

"This court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof."

Missouri K. & T. Co. v. *McCann & Smith,* 174 U. S. 580.

New York L. E. W. R. Co. v. *Pennsylvania,* 158 U. S., 431.

Clarke v. *Clarke,* 178 U. S., 186.

Nobles v. *State of Georgia,* 168 U. S., 398.

First Natl. Bank v. *Chehalis Co.,* 166 U. S., 440.

"The decision of the Supreme Court of a state sustaining a statute is conclusive in this court as to any question of conflict between the statute and the state constitution."

Merchants' & Manufacturers' Natl. Bank v. *Pennsylvania,* 167 U. S., 461.

Yazoo & M. V. R. Co. v. *Adams,* 181 U. S., 580.

The Ohio decision in the Neil case, 31 O. S., 15, *supra,* not only declares the policy of the state, but is sound in principle. Under the Ohio decision there is no foundation on which to rest the finding that the Board of Trustees is a *de jure,* a *de facto* or a *quasi* corporation. The Board is not a corporation at all. The most in any event that could be claimed is that it is a *quasi* corporation, which has been defined to be an association and government institution possessing only a portion of the attributes which ordinarily distinguish public or private corporations. 7 Am. & Eng. Ency. of Law, 2d Ed., 639.

Without conceding that it is a *quasi* corporation even, suffice it to say that, under the case of The Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S., 449, a *quasi* corporation cannot maintain a suit in the federal courts.

The defendant Board of Trustees lacks many corporate powers enjoyed by Ohio corporations, as will readily appear.

Sec. 3239, R. S. of Ohio, recites the general powers of a corporation created under the statutes of that state, and provides that "upon the filing of articles of incorporation the persons who subscribe the same, their associates, successors and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession, and power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real or personal estate as may be necessary and convenient to carry into effect the objects of its incorporation, to make and use a common seal and the same to alter at pleasure, and to do all needful acts to carry into effect the objects for which it was created."

The Board of Trustees does not enjoy all the powers conferred by Section 3239, R. S., *supra*, and possessed by corporations generally.

It may sue and be sued, contract and be contracted with, in its artificial name, but so may a partnership, general or limited (Sec. 5011, R. S.).

It has no power of perpetuating its succession, and hence does not possess the characteristic of immortality, and is unlike, in this respect, public and private corporations. The legislature may at any time terminate its existence by repealing the act creating it, or by refusing to levy a tax for its support.

Its membership is selected and determined by an outside influence and such election must be approved by the State Senate. Membership in a private corporation is obtained by subscribing for stock (Sec. 3244), or by subscribing the articles of incorporation (Sec. 3241); in a public corporation, such

as hamlets, villages and cities, by voluntarily acquiring a residence therein.

Membership in the Board may terminate only by death, by resignation, by expiration of a definite term of service, or by removal, but never by a transfer of a member's interest. Membership in a private corporation for profit may terminate by a transfer of shares; in a public corporation by a voluntary withdrawal therefrom.

It cannot acquire and convey real and personal property at pleasure, or do all needful acts to effectuate its purposes, as may a corporation (Sec. 3239), but is in these respects dependent on the caprice of the General Assembly.

It could locate the university and its place of business only within a given locality, i. e., in central Ohio, at an accessible railway point (Sec. 4105-18, R. S.). A corporation may name its own location at any point within the state.

It cannot change its location without legislative consent first had. A corporation may do so.

It cannot do business in other states or establish branch establishments therein. Corporations may do so.

It was not accorded the privilege of choosing its own name. Corporations select the names by which they are to be known (Sec. 3236).

It cannot change its name, or increase or diminish its power. Corporations may do so (Sec. 3238-a.)

It could not, in establishing a site for the university, incur a liability exceeding $40,000.00 without additional and special

legislative sanction. A corporation is not restricted in the indebtedness it may occur in establishing its plant or business.

It cannot and could not, without special legislative authorization, first obtained, broaden its business or add needed departments and acquire the personal property required for their operation, as the school of mines and mine engineering (85 O. L., 155; Sec. 4105-26, R. S.), the law school (90 O. L., 253), or the department of ceramics (91 O. L., 164), or collect specimens in mineralogy, etc. (75 O. L., 126), although all these matters are educational in their nature and constitute a part of the work of a great university. Corporations within the scope of their general powers may add all such things as will advance their interests.

It could not execute deeds without acquiring special legislative power (86 O. L., 92). Corporations are not so restricted.

It cannot construct buildings to meet its needs, unless the legislature first grants it authority so to do; but corporations enjoy such general power without an enabling act.

It cannot select its own attorney, but must draw its legal advice from the Attorney General(Sec. 4105-13; 67 O. L., 20). Corporations may employ such counsel as they please.

It cannot, without an enabling act, as a corporation may do, reconstruct buildings destroyed by fire, however important they may be (86 O. L., 47, 69).

It cannot, as a corporation may do, incur a debt, or refund a debt already incurred, without legislative consent first had (Sec. 4105-13; 91 O. L., 63; 93 O. L., 221).

Its funds are raised by taxation of the people at large, by appropriation by the legislature (91 O. L., 75; 92 O. L., 59, 191, 192, 404; 93 O. L., 26, 28, etc.); the funds of corporations are raised by the sale of stock, the issue of notes and bonds, by doing business at a profit, or by voluntary subscription or donations.

Its property, unlike that of corporations, is not subject to execution.

It has no capital stock.

It cannot introduce new members by a transfer of shares.

It does not have the power of eminent domain, as do public and *quasi* public corporations.

It cannot determine the size of its own membership, or control the admission of members, or the compensation of its employes (Sec. 4105-44).

It is not required to account to a membership, but to the Governor, and through him to the General Assembly (Sec. 4105-42, R. S.).

The Board cannot fill a vacancy occurring within itself. Vacancies are filled by the Governor. The directory of a private corporation may fill vacancies occurring within itself. Vacancies in offices of a public corporation may sometimes be filled temporarily by duly elected officers, but generally by the people electing persons to such vacancies.

It cannot dissolve or voluntarily terminate its existence. Private corporations may do so. The same is true of villages (96 O. L., 21).

The act creating it does not say it is a corporation.

Sufficient has been said to show that the Board of Trustees is a mere agent of the state, in control of a state institution for the promotion of educational interests authorized by the constitution of the state. Having limited and specified powers for a limited purpose, the acts done by the Board are performed agreeably to the authority delegated to it by the General Assembly and are in fact performed by it for and in behalf of the state.

Walsh v. Trustees, 96 N. Y., 427, is we think, decisive, paralleling closely the case at bar. The legislature (Star, p. 432), enacted a law entitled: "An act providing that the bridge in the course of construction over the East river between the cities of New York and Brooklyn, by the New York Bridge Company, shall be a public work of the cities of New York and Brooklyn, and for the dissolution of said company and the completion and management of said bridge by said cities." The act provided for the appointment of sixteen trustees, eight of which were appointed by the Mayor, Comptroller and President of the Board of Aldermen of each of the respective cities. Others acted as members of the Board *ex-officio*. The Board of Trustees was given full power, control and direction over the plan and construction of the bridge, were to hold office for two years, and vacancies were to be filled by appointment through the appointing power above mentioned. The expenses of constructing and maintaining the bridge and acquiring lands necessary therefor were imposed upon and assumed by the two cities. The Board of Trustees was given power to purchase, acquire and hold for the cities real estate for the purpose of

the bridge, to make and establish ordinances and laws regulating the use of the bridge, were authorized to sue and be sued in the name of "the Trustees of the New York and Brooklyn bridge"; were to keep and maintain the bridge in good repair and condition, make all needful rules and by-laws for its own government, select a president, secretary and treasurer and other officers and subordinates, and fix their compensation; submit monthly reports to the two cities as to receipts and expenditures, and were given the added right of eminent domain. The statute did not in express language create a corporation. There was no stock, or shares of stock, or fixed capital, or stockholders. Earl, J., said that while express words of incorporation were not necessary to create a corporation, nevertheless a corporation was not needed and every purpose of the act could be accomplished by the Trustees acting for and on behalf of the two cities as their representatives and agents, the cities furnishing all the corporate capacity needed to hold and perpetuate indefinitely the bridge and the property and franchises connected therewith. In speaking of the authority conferred by the act, he says: "The authority conferred upon the trustees by Section 5, to sue for penalties in the aggregate name of "the Trustees of the New York and Brooklyn Bridge," and the authority under Section 10 to substitute the Trustees as a party to any action pending for or against the corporation, do not show a legislative intention to create a corporation nor raise one by implication. The legislature could have authorized the same actions and proceedings to be maintained in the name of the president of the Board of Trustees, or in the name of any

other officer or agent of the cities, or of either of them. All that was mere matter of convenience. It is not uncommon for statutes to endow administrative boards which are organized for public purposes, and are mere public agents, with capacity to sue and be sued by an aggregate name. The name in which these trustees were authorized to sue was not given to them as a corporate name. They were not a self-perpetuating body; they owned no property, and whatever money they should recover for penalties or receive from any source, and whatever personal property should at any time be in their possession, they would be obliged to hold and administer for the benefit of the two cities for the precise purposes mentioned in the act. They represented and acted for the two cities as their agents, just as the water commissioners represented the city of New York in the cases of Appleton v. Water Commissioners (2 Hill, 432), and Bailey v. Mayor, etc. (3 id., 531, and 2 Denio, 433); as the board of public works represented the District of Columbia in the case of Barnes v. District of Columbia (91 U. S., 540); as the Rochester water commissioners represented the city of Rochester in 66 N. Y., 413, and as the park commissioners represented the city of New York in the case of Ehrgott v. Mayor, recently decided by us. In all the cases mentioned the commissioners and boards had powers quite as absolute and independent as those possessed by these trustees, and yet they were held to be mere agents of the municipalities which they represented."

It appears from what has been said that the Board of Trustees of the Ohio State University does not possess the es-

sential attributes of a corporation. We have applied the test of corporations as created by the statutes of Ohio. If tested by the doctrine of Liverpool Ins. Co. v. Massachusetts, 10 Wall., 566, the same result is obtained. That case arose originally in Massachusetts (Oliver v. Liverpool & London Life & Fire Ins. Co., 100 Mass., 531) under the Massachusetts law which imposed a tax upon premiums charged or received on contracts made in that state for the insurance of property, or received and collected by agents for the insurance of property, by insurance companies incorporated or associated under the laws of any government or state other than one of the United States. The insurance company was created by acts of the English Parliament which expressly declared that it was not a corporation. It was found by this court (Justice Miller delivering the opinion) that the association possessed many, if not all, of the attributes generally found in corporations for pecuniary profit, which were deemed essential to their corporate character, to-wit: (1) It had a distinctive and artificial name by which it can make contracts. (2). It had a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit. (3) It had provisions for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members were introduced in place of those who died or sold out. (4) Its existence as an entity, apart from the shareholders, was recognized by the act of Parliament which enabled it to sue its shareholders and be sued by them. In the

decision of that case the Court advanced beyond the line of preceding decisions in referring to the kind of association which may be treated as a body politic. The only contested question was whether the Insurance Company, an association formed in England under a deed of settlement or articles of association and endowed by several acts of Parliament with various corporate faculties, was a foreign corporation and so subject to taxes imposed upon its members by a law of Massachusetts. The pleadings showed on their face that all the members of the company were either citizens of Great Britain or of New York. There was no question involved touching the sufficiency of any jurisdictional averment in the pleadings.

The Insurance Company was radically different from the defendant Board of Trustees. It had capital stock and its property or capital stock was divided into shares and these shares were transferrable. They could be sold and transferred, and executors and administrators represented them in the company on the death of the owner. Thus there was perpetual succession. The members of the company were named as shareholders and sometimes as stockholders. They were liable for the debts of the company. The property of the company and of its shareholders was subject to execution. The members had no voice in the control of the company's affairs excepting through the board of directors, while all of the members of the Board of Trustees of the Ohio State University have a voice in the control of its affairs. The directors of the Insurance Company were accountable to the membership and not to the state, as is the defendant Board of Trustees. The

Insurance Company had the power to amalgamate or unite with another company and it might do this even without the consent of its members. The Insurance Company was not dependent from year to year for its existence on the action of a general assembly or of Parliament, or for revenues to continue its business or existence. No English court had decided that it was not a corporation, but the Ohio courts, passing upon the express law here under consideration, have held that the defendant Board of Trustees is not a corporation. If a Shareholder did not respond to calls assessed against him on his holdings, the Insurance Company could sue him and recover a judgment therefor. The shareholders of the company were guaranteed by the act of its creation the same rights as are secured to the stockholders of a corporation and might sue the company.

Unlike the Insurance Company, the Board of Trustees is not bound by a judgment rendered against it in any suit; a judgment rendered against it is in effect a judgment against the state and can be paid only as the state provides for payment.

The defendant Board has no provision for perpetuating succession. It has no capital stock. There are no shares to transfer and transmit. New members cannot be introduced through others dying or selling holdings of stock. The Board cannot sue its members as shareholders may be sued, nor can it be sued by them as shareholders may sue a corporation.

The decision in Neil v. Board of Trustees, *supra,* was but declaratory of the settled law and policy of the state.

If the Ohio State University and the institutions for the

insane, imbecile, blind, deaf and dumb, and orphans of soldiers and sailors, etc., are not mere state agencies and public institutions, but are in fact corporations, then the acts creating them are all unconstitutional. If the General Assembly cannot by special acts create and maintain such institutions, and boards to represent it as its agents in the conduct of such institutions, it then follows that it cannot legislate for them at all, for a general law governing such institutions is not conceivable, and Article 7 of the Constitution must then be held to be in conflict with Sections 1 and 2 of Article 13.

The court, however, should, if possible, give effect to all parts of the Constitution, and should not, directly or indirectly, obliterate provisions, statutory and constitutional, which the people and courts of the state have long recognized and enforced.

If the court finds the Board of Trustees to be a corporation, it must declare the act of its creation unconstitutional.

In School District v. Insurance Co., 13 Otto, 107 (103 U. S.), there was involved a special act authorizing a school district to issue bonds for the purpose of erecting a school building, procuring a site therefor, and setting apart a fund to pay for the same. Section 1 of Article 8 of the Constitution of that state provides, "The legislature shall pass no special act conferring corporate powers," and is identical with Section 1 of Article 13 of the Constitution of Ohio. The state court had not held the act constitutional. The Nebraska statute, relating to schools generally, made school districts corporations in the full sense of the word. It was contended there that the consti-

tutional provision applied only to private corporations, as distinguished from those which are a part of the body politic, such as counties and towns. But. Mr. Justice Miller said:

> "But we see no warranty for this distinction. There is certainly nothing in the words of the provision to suggest any such distinction or limitation; nor do we see any reason why the local corporate bodies discharging public functions should not be governed by general and uniform laws, as well as those for private enterprise. In fact, the weight of the argument seems to be the other way, for it can very well be seen that the aggregation of individual capital and energy into an associate organization may acquire different powers in each enterprise so established, while the powers to be exercised by cities, towns, townships and school districts in the same state may, or should be, uniform in character all over the state. If any such rule is defensible at all, of which it is not our province to judge, its application to the latter class of corporations seems the more appropriate of the two. *The constitution of the State of Ohio has a similar provision to that of the State of Nebraska, relied on in this case.* In State v. Cincinnati, 20 O. S., 18, the Supreme Court of that state held that in the purview of the constitutional provision, there was no distinction between private and municipal corporations. To the same effect is the decision of the same court in Atkinson v. M. & C. R. R. Co., 15 Id., 21. * * We are of the opinion that this is a sound construction of the constitution."

The court thereupon held the Nebraska law unconstitutional.

At the time the law was enacted calling the Ohio State University into existence, a special law conferring corporate powers could not be constitutionally enacted.

The General Assembly did not, therefore, intend to make it a corporation, because the law would be unconstitutional. The legislature did have authority to enact special laws which did not grant corporate powers. The Supreme Court of Ohio has held the act creating the defendant Board and the university to be such a law.

Should this court conclude that it would have decided differently the question disposed of in Neil v. Board of Trustees, 31 O. S., 15, *supra*, it will now refrain from so doing.

In Chestnut v. Shane's Lessee, 16 O., 599, decided in 1847, a deed executed in 1819, under a law passed in 1818, was involved. The act of 1818 was not then so old as the act creating the Ohio State University. That law required the acknowledgment of deeds to state that the contents of the deed were made known to the wife. The uniform practice in the acknowledgment of deeds had been to omit such certification. The bar throughout the state did not understand it to be necessary. The court, quoting Brown v. Farran, 3 O., 140, said: "No law can require the correction of and (an) error in its construction, which has long existed, and has been generally acquiesced in." "If it had been the opinion of the court that the words of the statute ought to be literally copied, and that such should have been the course from the beginning, they would have resorted to the maxim, *communis error facit jus*, rather than encounter the consequences of shaking the title to an indefinite portion of the state."

What was thus said can be sustained as a safe and sound rule of action.

The same principle is stated in McKeen v. Delancy's Lessee, 5 Cranch, 22, where it appears that a deed executed in 1771 was the subject of litigation in 1809. The law of Pennsylvania required the acknowledgment of a deed to be made before a justice of the peace of the county in which the land lies. It had long been the custom, prior to 1775, to acknowledge deeds before a justice of the Supreme Court of the province of Pennsylvania. Chief Justice Marshall said that while the court would hold illegal the deed in question, which had been acknowledged by a justice of the Supreme Court, were the act before it for the first time for construction, and would further hold that such justice was not a justice of the county, nevertheless infinite mischief would ensue, disturbing land titles, were a different rule announced from that established in the state of Pennsylvania by long and universal practice and sanctioned by the justices of the highest courts of that state.

This court should not, therefore, disturb the policy of Ohio as determined by an unbroken line of legislation and decisions extending over more than half a century.

In the foregoing discussion, in considering the laws of Ohio applicable to private and public corporations and to the Board of Trustees of the Ohio State University, the principle has been invoked that "in the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone,

needing no averment or proof." Hanley v. Donoghue, 116 U. S., 1.

> "The law of any state of the Union, whether dependent on the statutes or upon judicial acts, is a matter of which the courts in the United States are bound to take judicial notice without pleas or proof."
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> *Lamar* v. *Micou*, 114 U. S., 218.
> *Pennington* v. *Gibson*, 16 How., 65.
> *Elwood* v. *Flannigan*, 14 Otto, 562.
> *Owing* v. *Hull*, 9 Pet., 625.

In Gerling v. B. & O. R. R. Co., 151 U. S. 673, an act relating to a railroad company was under consideration. Mr. Justice Gray said that the statutes creating railroad corporations, or licensing and authorizing them to exercise their franchises within a given state, were public acts to be judicially noticed by Federal courts sitting within such state, and then proceeded to consider the statutes generally bearing on the subject of railways. The question involved in the case at bar relates to the characteristics and powers of a board sued as if it were a corporation, and to determine whether it is such the Court may examine all the laws and decisions of Ohio bearing on the subject of corporations and relating to the defendant board of trustees to determine whether such board is a corporation or not.

IF THE SAID BOARD OF TRUSTEES BE NOT SUCH A CORPORATION AS IS REQUIRED BY

THE JURISDICTIONAL RULE REFERRED TO, MAY THIS SUIT BE MAINTAINED AGAINST IT AS "THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY" WITHOUT BRINGING THE PERSONS CONSTITUTING THE BOARD BEFORE THE COURT AS DEFENDANTS?

The suit should have been brought against the individual members of the Board of Trustees as trustees, or as members of the Board of Trustees, i. e., against "John Doe, Richard Roe," etc., "as Trustees of the Ohio State University," or "as members of the Board of Trustees of the Ohio State University," or by some other fitting description of such individuals as trustees. In the body of the pleadings there should also be an appropriate averment that such individuals are the Trustees and constitute the Board of Trustees of the university.

The case of the Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S., 449, is authority for the doctrine that only corporations or natural persons can sue or be sued by their respective names in the United States courts.

Beatty v. Kurtz et al., trustees of the German Lutheran Church, 2 Cranch, 566, furnishes a guide. The individual names of the defendants (complainants below) were fully set out, followed by a designation of them as trustees of the church, an unincorporated society. The suit was brought by them in behalf of themselves and the other members of the church. The court held that an unincorporated society cannot maintain a suit in its name. The action must be brought in the name of the members of the society.

Ebbinghaus v. Killian, 1 Mackey, 247, is another case which serves as a model. An individual sued in his name as a

trustee, duly appointed by the court, against the individuals who were trustees of the German Evangelical Concordia church. The names of the individuals who composed the board of trustees were set out, followed by a designation of them as trustees.

The Board of Trustees is like an unincorporated society or company, so far as its rights and liabilities are concerned, excepting as they are restricted by the statute creating such board. At common law, an unincorporated society or company must sue or be sued in the same manner as a partnership. The names of the members composing the society or company, however numerous they may be, must be set out, unless they are so numerous that the court will permit a few to sue in behalf of all similarly situated. 22 Ency. of Pl. & Pr., 230, 242.

The reason is that an unincorporated society or company, association or board, has no legal entity distinct from that of its members. This rule is recognized in Ohio. In Haskins v. Alcott, 13 O. S., 216, it was said, "a suit by or against a company not incorporated, by its firm name, and without disclosing the names of the several partners, could not be maintained at common law. It lacked the certainty deemed essential to judicial proceedings. 1 Chitty Pl. (10th Ed.), 256, and cases cited."

The rule may be an inconvenient one, as the Ohio court said, but it is operative until modified by statute.

An Ohio case illustrative of the rule is found in Matoon et al., Trustees of Mohawk Lodge, v. Wentworth, 4 Bull., 513. The individuals, Matoon and others, sued, describing themselves as trustees of a given organization.

A statement of the rule governing such cases is also found in Higdon v. Gardner, 2 Ohio C. C., 340.

See also Curd v. Wallace, 7 Dana, 190 (32 Am. Dec., 85); Cook on Corp., 4th Ed., Vol. 2, p. 947.

The practice in the lower federal courts is exemplified in American Steel and Wire Co. v. Wire Drawers, etc., Union, 90 Fed. Rep., 598. The suit was against two labor organizations, whose names were followed by those of a number of individuals, but the allegations of the bill did not show that the individuals were members of the unions. The unions, it was held, were not suable entities. The failure to aver that the individuals were members of the unions was also found to be a fatal defect unless remedied by an amendment containing such an averment, which amendment was allowed.

Another case illustrating the principle under consideration is Greer, Mills & Co. v. Stoller et al., 77 Fed. Rep., 1. The Kansas City Live Stock Exchange was constituted for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, nor for the transaction of business, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City stock yards, and to promulgate and enforce amongst the members correct and high moral principles in the transaction of business. The Exchange adopted a code of by-laws and had a governing board of directors. The complainant was charged with an offense, found guilty, fined, and refused to pay the penalty imposed. The board sought to enforce the penalty by attempting to induce the members of the Exchange not to transact bus-

iness with the accused. The bill was filed against the individual members composing the board and not against the unsuable board itself. The court quoted with approval and followed Dicey on Parties, p. 149, and Jones v. Fipps, 59 Am. Dec., 711.

> "The bill of an unincorporated company should be prosecuted in the name of the individual partners, and not in the name of the company."
>
> Metal Stamping Co. v. Crandall, 17 Fed. Cas. 171. (Case No. 9, 493c.)

It is a well settled principle of law that a society that cannot be incorporated cannot maintain a suit in its aggregate or collective name. The Detroit Agitation Verein was formed principally to oppose the enforcement of a *prima facie* valid act of the legislature of the state of Michigan. It collected and expended money for the purpose of defending prosecutions under the prohibitory liquor act. Having surplus funds it loaned some of them, and brought suit (44 Mich. 313) as "a body corporate organized and existing under the laws of the state." Marston, J., said that there was no statute authorizing the formation of corporations to oppose the enforcement of other statutes or to agitate for their repeal, or to influence legislation, or to give immunity to convicted parties by paying their fine for them, and that it would be preposterous for the legislature to provide for organizing corporations for such purpose. Judgment having been rendered for the plaintiff below, it was reversed because there was no law for the incorporation of the society, and for the further reason that the society was unincorporated, it being held:

"Corporations cannot exist except by force of express law. . .

A society that cannot be incorporated because organized to resist the enforcement of laws, cannot sue in its society name for the collection of a debt."

The case is in point. The constitution of Ohio does not authorize the formation of a corporation to be known as the Board of Trustees of the Ohio State University. It expressly prohibits such. The Board therefore cannot sue or be sued in a Federal court as a corporation.

"If a voluntary association of persons, not incorporated, should affect, by their bill, to sue in the style of a corporate body, the bill would be demurrable, if the objection appeared upon the face of it; for it is the exclusive prerogative of the government to create corporations, and invest them with the power of suing, as such, by their corporate names. Story Eq. Pl., Secs. 396, 397.

The general rule is that all the parties in interest, although numerous, should be brought before the court. An exception is allowed, founded on the fact of numerousness. Story Eq. Pl. Sec. 95. 1st. Where the question is one of common interest, and one or more sue, or defend for the benefit of the whole. Ib. Secs. 97-100. Hendrick v. Robinson, 2 Johns. Ch. 296. As in the case of a few creditors maintaining a suit on behalf of themselves and the other creditors of a deceased debtor. Whitmore v. Oxborrow, 2 Y. & Coll. New R. 13, 17; May v. Selby, 1 Y. & Coll. New R. 235; Hallett v. Hallett, 2 Paige, 18; Ross v. Crary, 1 Paige, 417, note; but the creditors who bring the bill, must allege that it is brought on behalf of themselves and all the rest of the creditors. Leigh v. Thomas, 2 Ves. 13; Brown v. Ricketts, 3 Johns. Ch. 553; see, also, Brinckerhoff v. Brown, 6 Johns. Ch. 151; Joy v. Wirtz, 1 Wash. Circ. 417. By analogy to the case of creditors, one legatee may sue for himself and other legatees. Mitford Eq. Pl. by Jeremy, 167;

Brown v. Ricketts, 3 Johns. Ch. 553; Pritchard v. Hicks, 1 Paige, 273; Fisk v. Howland, 1 Paige, 23; Caldecott v. Caldecott, 1 Craig & P., 183; Harvey v. Harvey, 4 Beavan, 215, 220."

Lloyd v. *Loaring*, 6 Ves. Jr., 773, note.

"So, if a voluntary association of persons, not incorporated, should affect, by their bill, to sue in the style and character of a corporate body, the bill would be demurrable on that very account, if the objection appeared upon the face of it; for it is the exclusive prerogative of the government to create corporations, and to invest them with the powers of suing, as such, by their corporate name. Therefore, where some of the members of a lodge of freemasons brought a bill against others for the delivery of certain specific chattels, in which bill there was mention made of their laws and constitution, and the original charter, by which they were constituted, and a great affectation of a corporate charter, a demurrer was allowed; because the court will not permit persons, who can only sue as partners, to sue in a corporate character; and, upon principles of public policy, the courts of the country do not sit to determine upon charters granted by persons who have not the prerogative to grant charters."

Story Eq. Pl., Sec. 497.

"For though where a plaintiff assumed an individual character, as that of an administrator, to which he is not entitled, the contrary can only appear by a negative plea, yet where plaintiffs assume a corporate character, it must appear sufficiently on the bill itself that they are not entitled to sue in that character, and therefore a demurrer to the bill will be good. A voluntary society or associated company may be of this description, and a few of its members may maintain a suit without joining all persons interested as parties to it; but if they affect to sue in the style and character of a corporate body, such bill will be *felo de se.*

Cooper's Eq. Pl., pp. 164, 165.

"If persons, not being incorporated, enter into a contract as a corporation, they cannot sue in such corporate capacity; and in the late case of Gooch v. Goodman, 2 G. & D. 159, where three persons professed to enter into a contract as masters and governors of a hospital, to which contract a common seal was affixed, it was held that such a contract could not be considered as the contract of the three as individuals, the seal professing to be the seal of a corporation, and that they could not sue on such contract in a corporate capacity, without being in law a corporation. See, also, Graves v. Colby, 9 Ad. & El. 356; 1 P. & D. 235."

Chitty on Pl., Vol. 1, pp. 18, 19, Note.

"In a late case where wholesale grocers formed a society under the title of the Fruit Club, under the management of a select committee, who contracted for the purchase of imported fruits and supplies for the general trade, it was held on a bill filed against the committee that they could not object for want of parties, and the court said they could not be liable to non-suit at law or defend an action upon such an objection; but care must be taken in cases of this sort that the members of a society so suing do not assume a corporate character, for if they assume the style of a corporation their bill cannot be sustained."

Mitford's Eq. Pl., pp. 40, 41.

In Lloyd v. Loaring, 6 Ves., Jr., 773, plaintiff and two others on behalf of themselves and all other members of a Masonic Lodge, except the defendant and another, sued the last two named persons, stating that they are members of the lodge of Masons known as Caledonian Chapter No. 2, and that Lloyd is the principal officer and the other two plaintiffs secretaries or other officers, and that the three plaintiffs have the sole management and direction of the affairs of the chapter

or lodge. The suit involved addresses, declarations, books, papers, tools and implements of the organization and prayed a discovery and an injunction. Lord Elden held that a voluntary association is an unauthorized body, has in law no existence; that the individuals had a joint interest and absurdly represented themselves as corporate. He refused to permit plaintiffs to sue as a corporation, but permitted them to sue as individuals.

IF THE SAID BOARD MAY SUE OR BE SUED IN A FEDERAL COURT BY THE NAME OF "THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY," ALTHOUGH NOT CONSTITUTING A CORPORATION OF THE STATE OF OHIO, WITHIN THE JURISDICTIONAL RULE REFERRED TO IN THE FIRST QUESTION, DO THE FACTS STATED ON THE FACE OF THE BILL SUFFICIENTLY SHOW THAT THE PERSONS COMPOSING SAID BOARD OF TRUSTEES ARE CITIZENS OF OHIO, OR SHOULD THE COURT TAKE NOTICE OF THE LAW CREATING SAID BOARD OF TRUSTEES, AND OF OTHER LAWS OF OHIO DEFINING THE QUALIFICATION OF SUCH TRUSTEES, AND BY LEGAL INTENDMENTS FIND THAT THE PERSONS CONSTITUTING SAID BOARD WHEN THIS BILL WAS FILED WERE IN FACT CITIZENS OF OHIO AND THAT THE REQUISITE DIVERSITY OF CITIZENSHIP EXISTED TO GIVE JURISDICTION TO THE CIRCUIT COURT?

Our contention is that the Board of Trustees of the Ohio State University cannot be sued in that name. If the Court should hold otherwise, the facts stated on the face of the bill do not sufficiently show that the persons composing the Board of Trustees are citizens of the state; nor under the facts pleaded can the Court take notice of the law creating the Board of Trustees, or other laws defining their qualifications. If the Board is not a corporation, no presumption arises that its members are citizens of the state of its creation, because such presumption is predicated on corporate existence.

The allegation of the amended bill of complaint is "the said The Board of Trustees of the Ohio State University is a *citizen* of and domiciled in the state of Ohio." The Board is treated as a single and individual entity, as if it were in fact a corporation, and citizenship is imputed to such single and individual entity, and not to the members thereof. The demurrer filed by the Board designates it as a *defendant*, a single defendant.

In Lafayette Ins. Cc. v. French, 18 How., 404, it was said that the averment, "The Lafayette Insurance Company is a *citizen* of the state of Indiana," "can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons or an association into a body politic created by law is a citizen of a state, within the meaning of the constitution."

In Piquignot v. Pennsylvania R. Co., 16 How. 104, it was said, in speaking of a corporation, that the record must show that "its corporators, managers or directors are *citizens* of

Pennsylvania, nor can want of such averment be supplied by inference from the name."

Here then is the test to be applied in this case. Does the record show that the managers, directors or *trustees* are citizens of Ohio?

In Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 295, 296, it was stated that in Bank v. DeVeaux, 5 Cranch, 61, and Bank of Augusta v. Earl, 13 Pet. 512, the suit was in a corporate name, but *the citizenship of all the members was averred*, and that "such suit should be regarded as the joint suit of the individual persons united together in a corporate body and acting under the name conferred upon it for the more convenient transaction of business and consequently entitled to maintain a suit in the courts of the United States against a citizen of another state."

The above case illustrates the rule that if the corporate name is used without an averment of corporate existence, the citizenship of all the members must be averred and the suit will then be regarded as the joint suit of the individual persons united together in a corporate body and acting under its corporate name. The pleadings in this case do not measure up to the rule above announced. If there is not in fact a corporation, not a suable entity, then the board is in the position of a mere voluntary association and the court cannot look beyond the name of such entity in the absence of an averment as to the individual names of the members and regard the suit as against the individuals composing such entity, which has no legal being.

The board of trustees has not the franchise to be a corporation. The fiction, therefore, that the stockholders are conclusively presumed to be citizens of Ohio, under whose special legislative enactment the board was created, does not apply. What the board is, is not alleged. It cannot be assumed that it is a legal entity aside from its members. That it has members and who they are is not stated. Such an entity is not and cannot be a citizen of any state. There is nothing on which to predicate the assumption or base the imputation that the members of the board are citizens of Ohio. "It is not sufficient that jurisdiction may be inferred argumentatively from the averment." Wolf v. Insurance Co., 148 U. S. 389.

There must appear upon the record, not that the board is composed of a citizen, but of citizens; not that the single individual entity, the board, is or consists of a single citizen, but that it is composed of a number of citizens.

This is illustrated in Covington Drawbridge Co. v. Shepherd, 20 How., 227, where it was alleged that Shepard and others, "citizens of the State of Ohio, complain of the Covington Drawbridge Co., *citizens* of the state of Indiana, defendants in this suit," etc. The plural number was used in describing the citizenship of the Covington Drawbridge Company. The allegation was that that Company consisted of an aggregation of individuals and it was held that "in a suit by or against a corporation in its corporate name, an averment that they were *citizens of* a particular state (if such was the fact) is sufficient to give jurisdiction to a court of the United States." And in the closing sentence Chief Justice Taney said: "In the

case before us the averment of the citizenship of the members of the corporation is all that is required."

No such averment is found in the pleadings in this case.

The New York Court of Appeals, in Stevens v. Phoenix Insurance Co., 41 N. Y., 153, citing Covington Drawbridge Co. v. Shepard, *supra*, calls attention to the distinction therein made, and says that "an averment that the Covington Drawbridge Company *were citizens* of Indiana was sufficient to give jurisdiction to the Circuit Court of the United States, because the company was incorporated by a public statute of the state, which the court was bound judicially to notice." The language is not that the Bridge Company was a citizen, but that it *were citizens*. The citizenship of all the members of the corporation was averred; while in the case at bar the citizenship of the individual and single entity, the Board itself, is all that is averred.

In St. Louis & San Francisco Ry. Co. v. James, 161 U. S. 545, the particular form of averment of corporate existence does not definitely appear, but the case is instructive as it contrasts Bank v. DeVeaux, 5 Cranch, 61, to mean that the plaintiff, though suing in its corporate name, could make the averment that the *individuals* who composed the corporation were such aliens or *citizens* of a different state, and such averment, if not traversed, would sustain the jurisdiction.

In Bank v. DeVeaux, *supra*, the petition recited thus: "The petition of the President, directors and company of the Bank of the United State, which said bank was established under an Act of Congress entitled: 'An Act to incorporate the

subscribers to the Bank of the United States,' passed the 25th dav of February, 1791, showeth;" and immediately before the prayer was the averment, "And your petitioners aver that they are *citizens* of the State of Pennsylvania, and the said Peter DeVeaux and Thomas Robertson are *citizens* of the State of Georgia."

There was in that case, what is not in the case at bar, an averment of corporate existence clearly made. There was further upon the record the averment that the petition was brought by the president, directors and company of the Bank of the United States—a number of persons—followed by the distinct allegation that they are *citizens* of Pennsylvania and that the defendants were citizens of the state of Georgia.

In the above cases corporate existence was averred as an affirmative fact, and citizenship was averred in the plural number.

This was so in Express Co. v. Kountze Bros., 8 Wall., 342, where it was alleged that "the plaintiff (Kountze Bros.) was a firm of *natural persons*" and further, they sued in their associate name; they alleged that they were natural persons, more than one.

If the Board of Trustees sues or is sued in its artificial name, there must be, to give jurisdiction to a federal court, the further allegation that the Board of Trustees are *citizens* of Ohio. Before the citizenship of the members of a corporation can be imputed to it, it must in fact be a corporation and the citizenship of the members must be averred. If the Board of Trustees is a corporation, the allegation that it is a citizen of the State of Ohio created by the law of that state would be

sufficient, but, inasmuch as it is not a corporation, then the citizenship of the members composing that Board must be averred, just as was done in the cases of Kountze Bros. and Drawbridge Co., *supra.*

The citizenship of the *members* must be affirmatively alleged and in the plural. The amendment to the bill in this case neither sets out the names of the trustees nor makes them parties, nor does it allege the citizenship of the members of the Board, nor corporate existence; nor does it indicate the number of members.

The Board of Trustees is an artificial entity and not a natural person. Of it citizenship is alleged, but the members are not mentioned. They are not averred to be citizens of Ohio, and the case is thus distinguished from those above cited. There being no averment regarding the members, their citizenship cannot be imputed to the Board, for the record must show their citizenship. Chapman v. Barney, *supra.*

In the Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S., 449, the mere allegation that an association of persons is a citizen did not give jurisdiction, and it was distinctly held that the members of the association must be brought into the record as parties by positive averment.

No decision of this or any other Federal Court has ever established the principle that the members of the Board of Trustees of an institution, located in Ohio, are all citizens of that state. To assume such a fact is as violent as to assume that all the members of a limited partnership are citizens of the state in which the partnership is formed.

Unless there is a corporation, the Court cannot look beyond the name and regard the suit as against the individuals composing it, because there is in such case no legal being.

Covington Drawbridge Co. v. *Sheperd,* 20 How., 233.

Respectfully submitted,

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